UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAVID SCHUDEL, et al, et ux, Plaintiffs, vs. GENERAL ELECTRIC COMPANY and KAISER ALUMINUM AND CHEMICAL CORPORATION, Defendants.	No. CS-92-081-FVS ORDER RE POST-TRIAL MOTIONS (Filed Nov. 25, 1994)

BEFORE THE COURT are certain post-trial motions. They were decided without oral argument on November 22, 1994. *See* Local Rule ("LR") 7(h)(3).

I. PLAINTIFFS' MOTION TO STRIKE

A. Background

Judgment was entered on July 13, 1994. On July 27, 1994, the defendants filed motions for both judgments as a matter of law and a new trial. Fed.R.Civ.P. 50(b); Fed.R.Civ.P. 59. That same day, copies of the motions were mailed to opposing counsel via Federal Express.

The plaintiffs now move the Court to strike the defendants' Rule 50(b) and Rule 59 motions. They argue that the motions were not served in a timely manner.

B. Ruling

Motions for judgment as a matter of law and for a new trial must be filed and served within ten days of the date judgment is entered. Fed.R.Civ.P. 50(b); Fed.R.Civ.P. 59(b). In calculating the ten-day deadline, neither intermediate weekends nor legal holidays are counted. Fed.R.Civ.P. 6(b). Thus, the defendants had until the twenty-seventh of July to file and serve their Rule 50(b) and Rule 59 motions.

It is undisputed that the defendants mailed copies of their motions to all opposing parties by Federal Express on July 27, 1994. Since "[s]ervice by mail is complete upon mailing," Fed.R.Civ.P. 5(b), the defendants' motions would appear to have been both filed and served prior to the deadline.

The plaintiffs disagree. They contend that sending documents by Federal Express does not constitute "mailing" within the meaning of Rule 5(b).

Notwithstanding the plaintiffs' disagreement, they have failed to cite a single decision adopting their interpretation of Rule 5(b). They are forced to rely upon *Transco Leasing Corp. v. United States*, 992 F.2d 552, 554 n.2 (5th Cir. 1993), a case in which the Fifth Circuit cautioned, in dicta, "that service by Federal Express may not be service by mail."[1]

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[1] Professors Wright and Miller mention *Transco*, but do not analyze the issue. 4A C. Wright, A. Miller, *Federal Practice and Procedure*, § 1148 (2d ed. Supp. 1994).

The defendants, by contrast, have cited two district courts decisions that considered – and rejected – the plaintiffs' position. Both held that Rule 5(b) does not require mailing through the United States Postal Service. *United States v. Certain Real Property & Premises Known As 63-29 Trimble Rd.*, 812 F.Supp. 332, 334 (E.D.N.Y. 1992); *Edmond v. United States Postal Serv.*, 727 F.Supp. 7, 11 (D.D.C. 1989), *rev'd on other grounds*, 949 F.2d 415 (1991).

Here, it was reasonable for the defendants to believe that the method of service they utilized would be more prompt than ordinary first class mail, and every bit as reliable. Given the plaintiffs' failure to cite authority supporting their interpretation of Rule 5(b), and the fact that two district courts have specifically rejected their position, the plaintiffs' motion to strike will be denied.

II. DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW.

The defendants offer six reasons why the Court should grant judgment as a matter of law. Fed.R.Civ.P. 50(b). They are as follows: (1) the plaintiffs' experts based their opinions upon unreliable data; (2) certain experts were not qualified, and their opinions do not constitute "scientific knowledge" within the meaning of Rule 702; (3) even if the disputed opinions are admissible, they fail to establish causation; (4) under Washington law, many of Dr. Lantsberger's opinions regarding causation are legally insufficient; (5) the plaintiffs were loaned servants; and (6) Kaiser owed no duty of care to the plaintiffs.

A. Reliability/Loaned Servant/Duty

Not all of the defendants' arguments require in-depth analysis. The first, fifth, and sixth may be disposed of rather quickly.

1. Reliability of Data

The Court refused to admit the "Nebel" exhibits because they were hearsay, and the plaintiffs had not demonstrated the applicability of an exception to the hearsay rule. Moreover, even if an exception had applied, the exhibits were cumulative. (Tr. at 5790-91).

Later, the defendants attempted to impeach Craig Thompson with statements he made to Ms. Nebel. *See* Fed.R.Evid. 801(d)(2)(A) (admission by party-opponent). The plaintiffs objected. (Tr. at 5970.) In sustaining the objection, the Court said, in part, "They [the Nebel exhibits] were not admitted because of concerns about reliability." (Tr. at 5984.)

The defendants have interpreted the court's statement as a finding that the Nebel exhibits were unreliable. When both sections of the transcript are read in context, it is evident that no such finding was intended.

2. Loaned Servant

The jury was instructed properly on the question of "loaned servant." Since there is substantial evidence to support the jury's determination that the plaintiffs were not loaned servants, there is no basis for granting the defendants judgment on this issue.

3. *Duty of Care*

With Respect to the question of "duty," the defendants have cited no new authority. The Court is satisfied that a duty existed.

B. Admissibility of Certain Expert Opinions

The second argument focuses on the admissibility of opinions given by Drs. Lantsberger, Goldstein, and Morton. The defendants submit that these three witnesses were not qualified to render opinions regarding toxic encephalopathy, and that their theories of organic brain damage are not supported by the scientific literature.

Both prongs of the second argument were raised prior to (and during) trial. After reviewing the materials presented by the parties, the Court ruled against the defendants on both issues.

Since then, the Ninth Circuit has decided two civil cases, the outcome in each hinging on the admissibility of expert testimony. Both opinions discuss the requirements of Rule 702 in light of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ___ U.S. ___, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Both agree that expert testimony may not be admitted unless the trial judge first determines that the expert's conclusions are based upon scientific knowledge. *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116, 1124 (9th Cir. 1994); *Claar v. Burlington Northern R. Co.*, 29 F.3d 499, 502 (9th Cir. 1994).

Although *Hopkins* and *Claar* are clearly relevant here, neither dictates a result different than that previously

reached by the Court. As a result, the Court declines to disturb its prior rulings regarding toxic encephalopathy.

C. Sufficiency of Certain Expert Opinions (Background)

The third and fourth arguments challenge the sufficiency of certain expert opinions – primarily those of Dr. Lantsberger. Because this part of the defendants' Rule 50(b) motion attacks sufficiency, it is necessary to describe the disputed opinions in some detail.

1. Dan Glass

Mr. Glass reported a number of symptoms to Dr. Paula Lantsberger, including heart palpitations, headaches, memory loss, and respiratory problems. Dr. Lantsberger was the only expert who attempted to link any of Glass' specific symptoms to work at Kaiser.

(a) Deposition Testimony

During a deposition in November, 1993, Dr. Lantsberger testified that she "just [didn't] know what caused [the heart palpitations]." (Tr. at 2317.)

With respect to a headache Glass complained of during May, 1990, Dr. Lantsberger testified that "it was probably a more migrainous type of headache and that it's probably not [related] to his exposure." (Tr. at 2325.)

Dr. Lantsberger was asked the following question regarding a headache Glass reported during September, 1991. "[I]s it true that the headache that he complained of

when you last saw him is unrelated to his industrial exposure at Kaiser?" (Tr. at 3180.) "True," she replied. *Id.*

Dr. Lantsberger was asked what factors she had considered in determining whether Glass' brain had been injured during the cleanup. They included "his function and his performance since working at Kaiser," "the absence of any objective, neurologic findings," and "the literature on mixed organic solvents." (Tr. at 3181.) Having considered those factors, she was asked whether it was true that she had concluded "that [Dan Glass] did not sustain brain damage as a result of working at Kaiser in 1988." *Id.* "Correct," she said. *Id.*

Finally, Dr. Lantsberger was asked to review a report prepared by Dr. Patricia Sparks, a board-certified specialist in occupational medicine. (Dr. Sparks had examined Mr. Glass at the request of Washington's Department of Labor and Industries.) In her report, Dr. Sparks had said "that there is no respiratory, neurological or mental impairment resulting from [Glass'] previous exposures on a more probable than not basis." (Tr. at 2350.) Dr. Lantsberger was asked whether she agreed with that statement. Once again, her response was, "Correct." *Id.*

(b) Direct Examination

Dr. Lantsberger's testimony at trial was dramatically different. She now said that it was probable that Glass had a pre-existing lung condition which had been aggravated by "exposure to chemicals." (Tr. at 1893.) She now assumed that Glass' headaches were related to the exposure. (Tr. at 1895.) She now opined "that there may be a relationship between his heart symptoms while working

on the site and his exposure to the chemicals." (Tr. at 1897.) Finally, in apparent reference to allegations of memory loss and difficulty in concentrating, she now said "that the symptoms that [Glass] was complaining of that had been a change over his base line would be related to his exposures." (Tr. at 1899.)

(c) Cross-examination

Dr. Lantsberger testified that she first examined Dan Glass during October, 1989, approximately ten months after the cleanup project. He did not complain of respiratory problems. (Tr. at 2288.) His examination was essentially normal. (Tr. at 2298.) He had normal pulmonary functions. (Tr. at 2305-06.) At that point, Dr. Lantsberger did not diagnose any respiratory injury or disease. (Tr. at 2312.)

Glass next went to Dr. Lantsberger during May, 1990. Once again, he neither mentioned respiratory problems, nor did Dr. Lantsberger diagnose any. (Tr. at 2326.) Glass did complain of headaches. However, during cross examination, Dr. Lantsberger conceded that she could not say there was a specific cause-and-effect relationship between his industrial exposure and the headaches he described. (Tr. at 2326.)

Dr. Lantsberger's last examination of Mr. Glass occurred during September, 1991. (Tr. at 2333.) At that time, he made no mention of respiratory problems. *Id.* He did, however, report headaches and memory loss. (Tr. at 2332.)

With respect to the former, Dr. Lantsberger again conceded that she was unable to find a cause-and-effect relationship between Glass' work at Kaiser and the headaches he mentioned. (Tr. at 2334.) With respect to the latter, Dr. Lantsberger's answers were somewhat coy. Nevertheless, when pressed by defense counsel, she finally acknowledged that she agreed with two other experts who had reported that Glass had no neurological or psychological impairment as a direct result of his work at Kaiser. (Tr. at 2347-52.)

(d) First Redirect Examination

On redirect, Dr. Lantsberger said that she thought Mr. Glass had experienced an "alteration in his level of consciousness" while working at Kaiser. (Tr. at 3099.) She did not, however, attempt to link that phenomenon with a specific injury.

Later, Dr. Lantsberger was asked whether it made "scientific sense" to determine whether each condition Mr. Glass' complained of could be attributed to work at Kaiser. (Tr. at 3138.) She denied that it did, insisting that "you have to look at the patient as a whole." *Id.*

Insofar as her prior testimony was concerned, Dr. Lantsberger said, "I was trying to indicate that as a specific, isolated, single, sole source cause, no, I couldn't ascribe things as each individual cause. I had to take them as a whole and as an aggregate group of, aggregate group of people, to provide the data I needed to develop my opinions." *Id.*

(e) First Recross/Second Redirect

During First Recross, Dr. Lantsberger was impeached with her prior deposition testimony. (Tr. at 3179-81.) In an effort to rehabilitate her, counsel for the plaintiffs attempted to show that the statements quoted by defense counsel referred to an examination requested by the Department of Labor and Industries. Plaintiffs' counsel implied that in the context of a Labor and Industries examination, a finding of "impairment" must be based upon certain limited objective factors. (Tr. at 3203-06.)

At best, the effort at rehabilitation was only partially successful. As noted above, it is clear that the opinion which Dr. Lantsberger gave during her deposition (*i.e.*, that Mr. Glass had sustained no brain damage) was based upon both subjective and objective factors. (Tr. at 3181.).

2. David Schudel

Mr. Schudel has been examined by Dr. Lantsberger on a number of occasions. Although Schudel described a number of symptoms, there were (at most) two medical conditions which Lantsberger was willing to say were more probably than not caused by his work at Kaiser. One was a sensitization to odors; the other was an "aggravation" of his "whole person."

(a) Deposition Testimony

David Schudel had been tested by psychologists Paul Domitor and Lloyd Cripe. Having reviewed that testing, Dr. Lantsberger was asked whether it was her "medical opinion that Mr. [David] Schudel does not have brain

damage as a result of his industrial exposure at Kaiser?" (Tr. at 2980.) She replied, "Correct." *Id.*

During her deposition, Dr. Lantsberger described Schudel's reaction to odors as a "conditioned response." (Tr. at 2989.) She explained it this way:

> I kind of liken it to the Pavlov's dog theory. When you put the dog, ring the bell, associate it with food, the dog salivates. You take Dave. You put him out with chemicals. You have somebody's investigation proceeding where he is seeing health effects that make him scared. Subsequently[,] he continues to be scared around chemicals.

(Tr. at 2990). Dr. Lantsberger was asked whether it was the investigation conducted by the county health department which rang the bell "and set in motion what has become – what has been a sort of cascading conditioned response from Mr. Schudel." *Id.* "Correct," she said. *Id.*

(b) Direct Examination

Dr. Lantsberger's causation testimony was interesting. When asked for the cause of "David Schudel's emotional reaction to smells," (Tr. at 1777), she said, "I think that on a reasonable medical certainty he did not have this before his initial exposure in 1988 and subsequently to that I think that it's, on a more probable than not basis, related to his initial chemical exposure in '88.") *Id.* In other words, since Schudel did not react to odors before being exposed to chemicals at Kaiser, it must be the exposure which caused the reaction.

Later, Dr. Lantsberger described certain pulmonary function tests which had been administered to Mr. Schudel after the trial was underway. (Tr. at 1840-41.) According to Dr. Lantsberger, the results indicated that Schudel's reaction to odors was not strictly psychological. (Tr. at 1841-42.)

Thereafter, Lantsberger was asked two additional causation questions. The first was "whether David Schudel's physical problems with chemicals, as far as his lungs, is in any way related to the 1988 clean-up?" (Tr. at 1843.) To this question she replied, "I do think that some of the problems that he's having with his lungs and reactions are reactions to his, his lung condition are related to his exposures in the '88 clean-up." *Id.*

As a second causation question, Lantsberger was asked "whether David Schudel would have these problems that you've identified if he was provided with adequate working protective gear in 1988?" (Tr. at 1843-44.) Ultimately, she said, "I think that if they had had respiratory protection equipment at that time frame, I don't think that he would be reacting as badly as he has now." *Id.* at 1844.

(c) Cross-examination

During the course of cross-examination, Dr. Lantsberger conceded that David Schudel does not have Reactive Airway Dysfunction Syndrome. (Tr. at 2978). She further conceded that he did not sustain brain damage while working at Kaiser. (Tr. at 2979).

Since the Kaiser project, Schudel has had numerous tests, including methacholine challenge tests, pulmonary function tests, neuropsychological tests, and chest x-rays. (Tr. at 2992.) Dr. Lantsberger acknowledged that prior to trial, none of the tests had revealed any pathology. (Tr. at 2992.) It was not until the Spring of 1994 (five and one-half years after the cleanup project) that Dr. Lantsberger was able to produce test results which "showed some alteration in pulmonary function capabilities." (Tr. at 2993-94.)

By the end of cross examination, Dr. Lantsberger had begun to back away from her earlier diagnosis. When asked whether the most recent pulmonary function test results could be described as a conditioned response, Lantsberger said, "I don't ascribe as much of that to the conditioned response now that we've got some of the other confounding variables out of the way. We've gotten the smoking out of the way, and I have data with him on a work site with nurses monitoring him on the work site." (Tr. at 3012.)

(d) Redirect

On redirect, Dr. Lantsberger twice asserted that David Schudel had experienced an alteration of consciousness while working at Kaiser. (Tr. at 3073, 3098.) No effort was made to link Schudel's alteration of consciousness with Lantsberger's prior diagnosis.

Later, counsel for the plaintiffs asked Lantsberger whether she had been cross-examined regarding "David Schudel as . . . a whole, live person or was it to the

isolated incidences [sic] of his existence?" (Tr. at 3140-41.) The latter, Lantsberger said. *Id.*

Plaintiffs' counsel asked whether it is "scientifically sound to consider David Schudel in terms of isolated incidences [sic]?" *Id.* "No," Dr. Lantsberger said, "it is not. You have to look at him in a whole." *Id.*

Finally, counsel for the plaintiffs asked, "Would you please tell the jury if you have any opinion as to David Schudel as a whole person in relationship to his exposure to the chemicals in 1988 on a more probable than not basis?" *Id.* After an objection, Lantsberger said, "[T]aking . . . into account the totality of his information and all of the information that was presented, in an aggregate way, I think that it was more probably than not an aggravation." *Id.*

(e) First Recross/Second Redirect

During First Recross, Lantsberger again admitted that Schudel sustained no brain damage from working on the cleanup. (Tr. at 3189.) During Second Redirect, Lantsberger was asked to return to what plaintiffs' counsel described as "the Pavlov's dog analogy." (Tr. at 3218.) Although Lantsberger had appeared to distance herself from that comparison at the close of cross-examination, she now reiterated the theory. (Tr. at 3219, 3221.)

3. Craig Thompson

Dr. Lantsberger described a variety of symptoms while testifying on Mr. Thompson's behalf. Only a limited

effort was made to link any of them to the cleanup project on a more probable than not basis.

(a) Deposition Testimony

Dr. Lantsberger first saw Mr. Thompson in October, 1989. He complained of memory loss, among other things. (Tr. at 2655.) With respect to memory loss, Dr. Lantsberger was asked the following questions during a deposition which took place in November, 1993. "[I]s it your testimony that his complaints of memory loss in 1989 may possibly have been due to his industrial exposure, but you can't say with probability that they were?" (Tr. at 2660.) "Correct," she replied. *Id.*

(b) Direct Examination

At one point, Dr. Lantsberger said that Thompson complained to her of feeling "very sleepy" and "high" while working at Kaiser. (Tr. at 1789-90). At another, she said she had treated him for memory loss. (Tr. at 1800). However, Lantsberger did not testify that Thompson's mental sensations reflected neurologic injury; nor did she say that his memory loss could be attributed (on a more probable than not basis) to work at Kaiser.

With respect to respiratory impairment, Lantsberger testified that Thompson "had indicated to me that he had had an increase in the symptoms that he's had since his exposure while he was at work." (Tr. at 1821.) The increase in symptoms was apparently enough to persuade Lantsberger "that the exposure on the work site aggravated his lung conditions." (Tr. at 1822.)

(c) Cross-examination

Dr. Lantsberger saw Mr. Thompson during October, 1989. The physical examination was normal, with the exception of "crackles in the bases of his lungs." (Tr. at 2676.) Besides doing a physical exam, Dr. Lantsberger ordered a number of tests. While a chest x-ray and pulmonary function tests were normal, (Tr. at 2679, 2685), a methacholine challenge test was positive. (Tr. at 2680.)

Mr. Thompson went to Dr. Lantsberger during June, 1990, complaining of a sore throat and cough. (Tr. at 2694.) She diagnosed an upper respiratory infection. (Tr. at 2695.) When asked whether the infection was "probably related or caused by his industrial exposure," (Tr. at 2696), she replied, "As a direct, single affect [sic], causal relationship, no." *Id.*

During December, 1990, Thompson was seen by one of Dr. Lantsberger's colleagues. (Tr. at 2703.) He had an upper respiratory infection. *Id.* According to Lantsberger, Thompson "may have had more sensitive respiratory mucosa, resulting in him having an increased susceptibility to infection." (Tr. at 2704.) However, when questioned by defense counsel, she conceded that it was a possible cause not a probable cause. *Id.*

Thompson went to Lantsberger during January, 1991, for another respiratory infection. (Tr. at 2706.) Lantsberger was asked whether it was true that the infection had a possible – but not a probable – relationship to his work at Kaiser. *Id.* She said, "As a specific single etiology causal factor, correct." *Id.*

Thompson went from February, 1991, until September, 1992, without further respiratory problems. (Tr. at 2720.) During an examination in September, 1992, Lantsberger detected crackles in his lungs. (Tr. at 2721.) However, she conceded that the crackles were consistent with his "significant" smoking. *Id.*

(d) Redirect Examination

Dr. Lantsberger explained her "aggravation" theory during redirect. She said, "[T]he fact that he is having problems that exist now that didn't exist before he had his work at Kaiser leads me to think that there was some aggravation of these preexisting conditions as a result of his workplace." (Tr. at 3083.)

As she had with respect to Dan Glass and David Schudel, Dr. Lantsberger testified that Thompson had experienced an alteration of consciousness while working at Kaiser. (Tr. at 3098.) However, she made no effort to link Thompson's alteration of consciousness with her prior diagnosis.

(e) First Recross

During recross, Dr. Lantsberger repeatedly asserted that Thompson's condition had been "aggravated" by work at Kaiser. In each instance, she was confronted with strikingly inconsistent deposition testimony. *See, e.g.*, Tr. at 3164 ("headaches he complained of in 1989 were different in frequency and severity and were most likely not related to the headaches that he was experiencing while

he was on the job site"); Tr. at 3165 (possible that memory loss was due to industrial exposure, but not probable).

4. Tim Schudel

Dr. Lantsberger was the only expert to testify on Tim Schudel's behalf. While on the stand, she listed the various symptoms he had reported to her. However, when it came to the question of causation, her testimony was quite tentative.

(a) Direct Examination

Dr. Lantsberger was asked whether she had "an opinion based upon reasonable medical probability as to whether there's any relationship between Tim Schudel's lung problems and memory problems and his exposure to the chemicals in 1988?" (Tr. at 1885.) She responded in the following manner, "He indicated to me that he hadn't had any problems with memory or concentration or breathing problems prior to his employment on the job site." *Id.*

Shortly thereafter, Dr. Lantsberger was again asked whether she had "an opinion as to whether there's any relationship between Mr. Tim Schudel's long problems and his memory problems and the exposure to the chemicals in 1988?" (Tr. at 1888.)

She said, "Mr. Schudel had indicated to me in his history and through the testing process that he had not had any problems with his lungs nor any problems with his memory prior to being exposed in 1988." *Id.*

Plaintiffs' counsel followed up by asking, "So is there a relationship there?" *Id.* To which Lantsberger replied, "I believe so." *Id.*

(b) Cross-examination

Dr. Lantsberger acknowledged that although Mr. Schudel "needed to have a pulmonary work-up by a pulmonologist," Tr. at 2841, "[w]e never did get him in to see one." *Id.*

Mr. Tim Schudel was examined by psychologist Lloyd Cripe. Dr. Cripe asked that Mr. Schudel be informed "that there is no clear indication that his brain has been damaged as a result of his exposure." (Tr. at 2847.) Cripe went on to say, "While it is possible that his previous learning disabilities have been exacerbated or strained in some manner, it is not possible in a medical/legal manner to be reasonably certain that he has suffered any kind of appreciable brain dysfunction related to the industrial toxic exposure." *Id.*

After being counseled regarding Dr. Cripe's report, Schudel made no further complaints regarding memory loss. (Tr. at 2850.)

(c) Redirect

Dr. Lantsberger testified that Tim Schudel experienced an "alteration of consciousness" while exposed to chemicals at Kaiser. (Tr. at 3097.) As with the other workers, no effort was made to link that opinion to a specific diagnosis.

With respect to her "aggravation" opinion, Dr. Lantsberger said, "In relationship to him as a whole person in the totality of the information that was supplied to me, as a whole, I think that his condition was, on a more probable than not basis, an aggravation of his preexisting conditions." (Tr. at 3140.)

5. Kathrene Froese

Two experts testified regarding Ms. Froese's specific complaints. One was Dr. Jonathan Ostrow. The defendants concede that he "opined with reasonable medical probability that Ms. Froese [has] irritant-induced Reactive Airways Dysfunction Syndrome." (Defendants' Memorandum in Support of Renewed Motion at 76.)

The other expert to testify regarding Ms. Froese's complaints was Dr. Lantsberger. She mentioned a number of non-respiratory problems, including rash (Tr. at 1846-48), memory loss (Tr. at 1851, 1862-64), headaches (Tr. at 2772-73), and "whole person" aggravation (Tr. at 3144.)

(a) Direct examination of Dr. Lantsberger

Ms. Froese told Dr. Lantsberger that she had developed a rash while working at Kaiser. (Tr. at 1846.) According to Ms. Froese, the rash appeared on those portions of her body that were most exposed to the cleaning agents she was using. (Tr. at 1846-47). Although Dr. Lantsberger implied that the cleaning agents caused the rash, she was never asked whether she had an opinion on that matter.

Dr. Lantsberger testified that Ms. Froese complained of memory "difficulties." (Tr. at 1862.) She acknowledged, however, that "we never were able to do full neuropsychological testing on her." *Id.*

Plaintiffs' counsel did not ask Lantsberger whether Froese's reported memory difficulties were related to her work at Kaiser. Plaintiffs' counsel did ask, however, whether it is "harder to show by objective test" that a person who is not very bright has "been injured by exposure to chemicals." *Id.* Lantsberger said that it was, clearly implying that the jury could find organic brain damage notwithstanding the absence of neuropsychological testing. (Tr. at 1862-64.)

(b) Cross-examination of Dr. Lantsberger

On cross, Dr. Lantsberger was asked whether she would agree that the headaches which Ms. Froese complained of in 1989 were unrelated to work at Kaiser. Lantsberger equivocated, saying, "Other than the fact that Ms. Howell indicated that since the time that she worked there she's had persistent headaches. In relationship to the fact that a significant number of the coworkers complained of this, which means specific etiology causing an infectious relationship, no, I can't do that." (Tr. at 2772-73.)

When defense counsel pressed for a more concise answer, Lantsberger replied, "As a specific sole cause, no." (Tr. at 2773.)

Later, Dr. Lantsberger was asked by defense counsel whether Ms. Froese had experienced an alteration of consciousness during the cleanup. (Tr. at 2828.) In response, Lantsberger testified that Froese "had commented that she had problems with headaches." (Tr. at 2829.) That led to the following exchange:

"Was a headache an alteration of consciousness," defense counsel wanted to know?

"It's a neurologic symptom," Lantsberger replied.

But "[I]s it an alteration of consciousness," defense counsel asked?

"Technically of consciousness, no," Lantsberger said. *Id.*

(c) Redirect examination of Dr. Lantsberger

On redirect, Lantsberger reversed her position on alteration of consciousness. With respect to that phenomenon, she now said, "That's often one of the symptoms of the chemical that is affecting the brain is by giving headaches." (Tr. at 3092.)

After soliciting that statement, counsel for the plaintiffs asked, "Did you take into account her alteration in level of consciousness and her low intellect in forming your opinions as to Kathrene Froese?" *Id.*

"Yes," Lantsberger replied, "I did." *Id.*

At that point, plaintiffs' counsel broke off her line of questioning. Although she suggested that she would

"come back to that," she never asked Lantsberger whether Froese's alteration of consciousness caused a specific injury.

The final issue addressed on redirect was that of "aggravation." Counsel for the plaintiffs asked, "Would you please tell the jury if you have an opinion, based upon reasonable medical probability, as to Kathrene Howell Froese as a whole person in relationship to her condition and her exposure to the chemicals at the 1988 clean-up at the Kaiser Trentwood plant?" (Tr. at 3144.)

After an objection, Lantsberger responded by saying, "As I had indicated, I have to look at these people as a total. And I have to look at all of the information as an aggregate. And as a result of putting all of the information together, I believe that the problems that she is experiencing are an aggravation of her preexisting condition. Aggravated as a more probable than not cause from her exposure." *Id.*

6. Merlin Carlson

Two experts analyzed the symptoms that Merlin Carlson reported. One was Dr. Daniel Goldstein. Although the defendants challenge the admissibility of his testimony on a number of other grounds, they concede that he testified – on a more probable than not basis – that Mr. Carlson sustained brain damage due to solvent exposure. (Defendants' Memorandum in Support of Renewed Motion at 82.)

The other expert who analyzed Mr. Carlson's symptoms was Dr. Lantsberger. Not only did she testify about

respiratory problems (Tr. at 1922-23, 1925-26), but she also testified about fatigue, headaches, "overall body pain," and "whole person" aggravation. (Tr. at 1926, 3143.)

(a) Direct examination of Dr. Lantsberger

On direct, Dr. Lantsberger was asked whether she had an opinion regarding the cause of Mr. Carlson's "problems with breathing." (Tr. at 1925.) She said that she had reached the "same conclusion" with respect to his "breathing problems" that she had reached with respect to his "brain injuries," namely, "[t]hat he has a similar pattern as the other coworkers, and that the overall epidemilogical data leads me to believe that his exposure in the work site is the joining factor of all of the physical problems." (Tr. at 1926.)

Next, Dr. Lantsberger was asked whether there was a relationship between Carlson's complaints of "fatigue, headache, [and] overall body pain" and "exposure to chemicals in 1988." *Id.* She replied, in part, "The other coworkers complaining of the same, similar respiratory, cognitive, joint and body aches, leads me to assume based on epidemiological look at the exposure, the symptoms beginning about the same time frame and continuing subsequently leads me to believe that they are associated with the exposure." (Tr. at 1926-27.)

(b) Cross-examination of Dr. Lantsberger

Dr. Lantsberger acknowledged that it was during August, 1991, that she last made a note regarding Carlson's complaints of breathing problems. (Tr. at 2935.) She

further acknowledge that Carlson does not have Reactive Airways Dysfunction Syndrome, (Tr. at 2935), and that she has never diagnosed asthma. *Id.*

With respect to "bone pain and joint aches," she said, "I don't know what caused these guys to have the aches and pains, but I do now that a significant number of the workers did have them." (Tr. at 2936.)

(c) Re-direct examination of Dr. Lantsberger

Dr. Lantsberger denied that it made sense to look at Merlin Carlson in terms of "isolated incidences [sic]." (Tr. at 3142-43.) Over objection, she testified, "In terms of his entire exposure, his preexisting as, as a consequence of his exposure, I think that his preexisting problems were aggravated by his exposure at Kaiser on a more probable that not basis." (Tr. at 3143.)

7. Deborah Williams

A number of experts testified for Ms. Williams, including Drs. Lantsberger, Morton and Keppel. Although much of Dr. Lantsberger's testimony may be construed as foundation for opinions given by other experts, she was asked to render opinions of her own. For example, during redirect, she reiterated her theory of aggravation, saying, "I think in terms of Debbie, again, . . . taking it in totality, that on a more probable than not basis, I think that her conditions as we have outlined them have been aggravated by her exposure at, by her work at the Kaiser plant." (Tr. at 3145.)

8. Ruth Hopkins/John Hopkins

The defendants concede that the Hopkins' principal claims involved respiratory injuries. The defendants argue, however, that the Hopkins also maintained a claim for brain damage. The record reflects the following concerning the defendants' contention:

During direct examination, Dr. Samuel Milham was asked by counsel for the Hopkins to read the conclusion of a study to the jury. Milham relied, in part, "[T]he *severe neurologic injuries suffered by the workers in the incident* are sobering reminders that easily preventable organic solvent related occupational illness continues to occur in a highly developed country in the late 20th century." (Tr. at 1436.) (Emphasis added.)

In addition, the Hopkins' attorney participated actively in the cross-examination of Dr. Neil Rosenberg, the defendant's expert on the subject of solvent-induced organic brain damage. (Tr. at 9473-89, 9529-40.) He questioned Rosenberg about neurologic injury in general, (*see, e.g.*, Tr. at 9481-82), and Mrs. Hopkins' case in particular – including magnetic resonance imaging ("MRI".) (Tr. at 9538-39.) He also had Rosenberg confirm that his testimony had nothing to do with the "pulmonary aspect of this case." (Tr. at 9540.)

During closing, the Hopkins' attorney devoted most of his time to pulmonary complaints. He did not restrict himself to that subject, however. For example, he asked the jury to think about Ruth Hopkins' "memory problems." (Tr. at 12022.) Later, he said, "These chemicals can hurt you. They can hurt your organs. They can hurt your brains." (Tr. at 12028.)

It was at this point that he asked the jury to discount Dr. Rosenberg's testimony about magnetic resonance imaging and Toluene abusers. In essence, he argued that his clients' exposure to organic solvents was distinguishable from that of the Toluene abusers Dr. Rosenberg had described, thereby implying that it was of no significance that Mrs. Hopkins's MRI was normal. (Tr. at 12028-29.)

D. Sufficiency of Certain Expert Opinions (Analysis)

A motion for judgment as a matter of law may be granted when "a party has been fully heard with respect to an issue and there is no *legally sufficient evidentiary basis for a reasonable jury to have found for that party* with respect to that issue. . . . " Fed.R.Civ.P. 50(a)(1). *See Montiel v. City of Los Angeles*, 2 F.3d 335, 342 (9th Cir.1993). The moving party must demonstrate that insofar as the verdict is concerned, the evidence permits but one reasonable conclusion. *Conner v. Sakai*, 15 F.3d 1463, 1467 (9th Cir.1993).

1. Dan Glass

Dr. Lantsberger examined Mr. Glass on three occasions. The first examination occurred during October, 1989; the second during May, 1990; and the third during September, 1991. Mr. Glass did not report respiratory problems on those occasions, nor did Dr. Lantsberger diagnose pulmonary injury or disability. Given the record as it now exists, a reasonable jury could not have found for Mr. Glass on that issue.

With respect to Mr. Glass' heart palpitations, Dr. Lantsberger could only say that they may have been related to his industrial exposure. Testimony of that sort is legally insufficient. Under Washington law, an opinion that a "physical disability 'might have' or 'possibly did' result from the hypothesized cause" is nothing more than conjecture. *O'Donoghue v. Riggs*, 73 Wn.2d 814, 824, 440 P.2d 823 (1968). "To remove the issue from the realm of speculation, the medical testimony must at least be sufficiently definite to establish that the act complained of 'probably' or 'more likely than not' caused the subsequent disability." *Id.*

Regarding headaches and memory loss, Dr. Lantsberger was forced to concede that she had been unable to find a cause-and-effect relationship between Glass' participation in the Kaiser cleanup and his subsequent complaints. Thus, her testimony concerning those conditions falls short of the *O'Donoghue* standard.

Dr. Lantsberger attempted to bridge that causal gap by suggesting that Glass' "whole person" had been "aggravated." However, after *Daubert* and *Claar*, it is difficult to see how Lantsberger's fall-back theory can be considered "scientific knowledge." If none of Glass's specific symptoms can be linked to the cleanup on a more-probable-than-not basis, how is it possible that his whole person was aggravated?

It is the plaintiffs' burden to demonstrate that Dr. Lantsberger arrived at her conclusions "using scientific methods and procedures," and that her "conclusion [are] not mere subjective beliefs or unsupported speculation." *Claar*, 29 F.3d at 502. Insofar as Lantsberger's aggravation

theory is concerned, the plaintiffs have failed to satisfy that requirement.

In conclusion, a reasonable jury could not have found for Glass on any of his claims. Dr. Lantsberger's causation testimony was legally insufficient, and her aggravation theory is not scientific knowledge.

2. David Schudel

It is undisputed that Mr. Schudel did not sustain neurologic injury as a result of his participation in the Kaiser cleanup. A reasonable jury could not have found for him on that issue. Similarly, although Dr. Lantsberger suggested that Schudel's exposure to chemicals caused actual pulmonary injury, she could say only that his "lung condition" was "related to his exposures." Given Lantsberger's uncertainty, a finding for Schudel on a claim of actual pulmonary injury would have been nothing more than speculation. *O'Donoghue*, 73 Wn.2d at 824.

Two possibilities remain. One is that Mr. Schudel has developed a conditioned response to chemicals as a result of working at Kaiser. The other is that his whole person was aggravated. The latter has already been discussed. It is not sound science. With respect to the former (*i.e.*, conditioned response), there are two serious questions. First, is Dr. Lantsberger qualified to render an essentially psychiatric opinion? Second, is there anything in the record to indicate that her opinion reflects scientific knowledge?

It is clear from Dr. Lantsberger's testimony that David Schudel's response to odors is psychological in

nature. Notwithstanding its psychological nature, plaintiffs' counsel made no effort to show that Dr. Lantsberger is qualified to diagnose or treat psychological disorders. Indeed, she freely admitted that she is not an expert in psychiatry. (Tr. at 2337.)

Even if Dr. Lantsberger was qualified to render a psychiatric opinion of the sort she gave here, plaintiffs' counsel failed to establish that Lantsberger's conclusion reflects sound science. Not one journal article was offered in support of Dr. Lantsberger's opinion, nor was an effort made to satisfy any of the other *Daubert* criteria. As a result, Dr. Lantsberger's opinion fails to pass Rule 702 muster.

3. Craig Thompson

Dr. Lantsberger failed to link any of Mr. Thompson's specific complaints to the Kaiser project on a more-probable-than-not basis. Her fall-back was "aggravation," a theory which does not meet the standards for admissibility established by Rule 702. It follows that the jury's verdict in Mr. Thompson's favor was based upon speculation, nothing more.

4. Tim Schudel

Dr. Lantsberger acknowledge that Mr. Schudel "needed to have a pulmonary work-up by a pulmonologist," but that she "never did get him in to see one." Notwithstanding the absence of expert pulmonological evidence, Lantsberger suggested that Schudel developed

respiratory problems as a result of his exposure to "chemicals." In that regard, however, she could say only that he told her that he had not had problems before Kaiser and that he did have problems after Kaiser.

That Mr. Schudel's symptoms appeared after he worked at Kaiser may establish a temporal link between work and symptoms, but it does not establish a causal link. *See Rohrbough v. Wyeth Laboratories, Inc.*, 916 F.2d 970, 974 (4th Cir.1990) (mere fact that a child suffered seizures after receiving a vaccination insufficient to establish causation). Dr. Lantsberger's testimony on that point is therefore insufficient.

Tim Schudel obtained neuropsychological testing. While the psychologist report that it was possible that Schudel's previous learning disabilities had been aggravated, he could not say that aggravation was reasonably certain. Indeed, as soon as Schudel was counseled regarding the report's findings, he quit complaining of memory loss. Given those undisputed facts, a reasonable jury could not have found for Mr. Schudel on the question of neurological injury.

That leaves Dr. Lantsberger's aggravation theory. It is neither scientifically nor causally sufficient to support the jury's verdict.

5. Kathrene Froese

A reasonable jury could have found for Ms. Froese on her respiratory claim. Were that her only claim, no further discussion would be necessary. However, it was not. Dr. Lantsberger was asked to testify regarding Ms.

Froese's complaints of rash, memory loss, and headaches. With respect to these symptoms, Dr. Lantsberger was either never asked about a causal relationship, or if she was, her testimony fell short of the *O'Donoghue* standard.

6. Merlin Carlson

Mr. Carlson's principal claim was for toxic encephalopathy. He did not stop there, however. Dr. Lantsberger reported breathing problems, fatigue, headaches, and "overall body pain."

With respect to respiratory complaints, Dr. Lantsberger was forced to concede that Mr. Carlson does not have Reactive Airways Dysfunction Syndrome or industrially induced asthma. Similarly, with respect to "bone pain and joint aches," she could only say, "I don't know what caused these guys to have the aches and pains, but I do know that a significant number of the workers did have them." Given the record, a reasonable jury could not have found for Mr. Carlson on his non-neurological claims.

7. Deborah Williams

Ms. Williams presented claims for organic brain damage and respiratory injury. A number of experts testified on her behalf. Although Dr. Lantsberger opined that Ms. Williams' "conditions" were aggravated by work at Kaiser, it is questionable whether her testimony would have had appreciable impact on the jury's verdict.

8. Ruth Hopkins/John Hopkins

Based upon the evidence presented by the Hopkins, their cross-examination of Dr. Rosenberg, and the manner in which they argued their case, a reasonable jury would have assumed the Hopkins were making a claim for brain damage. Granted, the jury may not have viewed it as the Hopkins' principal claim, but the jury would have understood that it was a very real part of the Hopkins' case. Therein lies the problem. Having chosen to make a claim for solvent-induced brain damage, the Hopkins were obligated to prove it. They failed to do so. A reasonable jury could not have found that the Hopkins suffered neurologic injuries as a proximate cause of the defendants' negligence. The defendants are therefore entitled to judgment as a matter of law on that particular claim.

E. Sufficiency of Certain Expert Opinions (Conclusion)

In view of the foregoing, the defendants are entitled to judgment as a matter of law on a number of claims. They include the following: all claims asserted by Dan Glass, David Schduel, Craig Thompson and Tim Schudel; all non-respiratory claims asserted by Kathrene Froese; all non-neurological claims asserted by Merlin Carlson; and all non-respiratory claims asserted by the Hopkins.

Although several claims must be dismissed, several remain. The next question is whether a new trial is necessary.

Approximately six weeks prior to trial, the Court asked the plaintiffs to list their claims against the defendants. (Order Re *Daubert* Procedure (Ct. Rec. 326) at 7.) The plaintiffs declined to do so. (Plaintiffs' Lists of Claims (Ct. Rec. 334).) Instead, they presented the jury with a long list of symptoms, only some of which could be connected to the plaintiffs' work at Kaiser on a more probable than not basis. Furthermore, when it came time to instruct the jury, the plaintiffs rejected a suggestion that the jurors be asked to decide specific claims.

The plaintiffs' choice of tactics has placed the Court in an awkward position. Because the jurors were not asked to return verdicts with respect to each plaintiff's individual claims, it is now impossible to separate the wheat from the chaff. Thus, the Court is forced to conclude that the verdicts in favor of Kathrene Froese, Merlin Carlson, Ruth Hopkins and John Hopkins are too tainted to stand. For that reason, the plaintiffs' remaining claims must be re-tried.

III. DEFENDANTS' MOTION FOR NEW TRIAL

The defendants give twelve reasons why the Court should order a new trial. Fed.R.Civ.P. 59. They include the following: First, by urging the jury to "send a message" to the defendants, the plaintiffs injected irrelevant, arbitrary, and punitive considerations into the jury's deliberations. Second, the Court failed to instruct the jury on Washington's medical causation standard. Third, the Court's instructions with respect to state and federal safety regulations were in error. Fourth, the Court failed to instruct the jury on the limited duties of the employer

of an independent contractor. Fifth, the plaintiffs violated a pretrial order by introducing evidence regarding Daniel Skeman. Sixth, the Court applied *Bryan v. John Bean*, 566 F.2d 541 (5th Cir.1978), in an improper manner. Seventh, the defendants should have been allowed to cross-examine the plaintiffs regarding inconsistent statements made to Diane Nebel. Eight, the plaintiffs should not have been allowed to offer evidence regarding symptoms experienced by non-plaintiff workers. Ninth, the plaintiffs were permitted to suggest that a defense expert had no basis for opining that Mrs. Hopkins's depression had a cause other than that suggested by her experts. Tenth, the jury's verdict was against the weight of the evidence. Eleventh, the damages awarded were excessive both as a matter of fact and a matter of law. Twelfth, the defendants' right to cross-examination was violated.

Given the Court's various rulings with respect to the defendants' motion for judgment as a matter of law, the defendants' alternative request for a new trial is moot with respect to all but Deborah Williams. Insofar as she is concerned, the defendants' motion is denied.

IV. PLAINTIFFS' REQUEST FOR ATTORNEYS' FEES AND COSTS

On July 22, 1994, the plaintiffs filed a timely request for attorneys' fees, together with a request for costs beyond those normally awarded to prevailing parties. Fed.R.Civ.P. 54(d). The defendants have objected to both.

Since then, the Court has granted the defendants' Rule 50(b) motion in substantial part, dismissing a number of the plaintiffs' claims. Only the verdict in favor

of Ms. Williams remains intact. However, because it does, she may be entitled to fees and costs.

The Court has two options concerning Ms. Williams's request. It can defer ruling until after the appellate process has run its course, or it can decide the matter of fees and costs at this juncture. Fed.R.Civ.P. 58 advisory committee's note (1993 amendment).

The latter is the best course. This lawsuit has generated a number of complex legal questions, among them whether Ms. Williams is entitled to fees and costs. Instead of presenting them to the Court of Appeals piecemeal, it is best to resolve as many as possible now so that they may be reviewed together. *Id.* ("in many cases it may be more efficient to decide fee questions before an appeal is taken").

One final issue must be addressed before turning to the merits of Ms. Williams's request – the matter of the Court's jurisdiction. As the advisory committee noted, post-trial fee requests can create complicated jurisdictional questions. To avoid them, Rule 58 permits a district court to treat a request for fees as a Rule 59 motion and extend the time for appeal from the underlying judgment. Fed.R.Civ.P. 58. It is appropriate to do so here, and the Court so orders.

A. Attorneys' Fees

Ms. Williams submits that her request for fees may be granted under either of two theories. One is based upon state law, the other upon federal law. The two theories will be examined separately.

(a) State Law

When a request for attorneys' fees is made in a diversity action, and the request arises from the substance of a state-law claim, the request is governed by the law of the forum state. *Price v. Seydel*, 961 F.2d 1470, 1475 (9th Cir.1992). Washington follows the "American Rule." *Dayton v. Farmers Insurance Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). According to that rule, a court has no power to award attorney fees as a cost of litigation absent a contract, a statute, or some recognized principle in equity. *Id.* Here, there is neither a contractual nor an equitable basis for awarding fees. If Ms. Williams is to recover attorneys' fees, she must cite a statute which authorizes them. She attempts to do just that.

According to Ms. Williams, the defendants violated the Washington Industrial Safety and Health Act ("WISHA")[2] by failing to provide adequate warnings regarding the solvents used in the cleanup. She does not assert that the defendants are liable for fees under WISHA, however. Instead, she argues that the defendants are liable for attorneys' fees under one of three entirely separate statutes – the Worker and Community Right to Know Act.,[3] the Hazardous Waste Management Act,[4] or the Model Toxics Control Act.[5]

Although ingenious, Ms. Williams's state-law theory is without merit. First, the jury did not find that the

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[2] RCW Chapt. 49.17.

[3] RCW Chapt. 49.70

[4] RCW Chapt. 70.105.

[5] RCW Chapt. 70.105D.

defendants violated either WISHA or any regulation promulgated thereunder. Thus, there would appear to be no basis for Ms. Williams's assertion that the defendants violated that statute. Second, while it is true that the Worker and Community Right to Know Act, the Hazardous Waste Management Act, and the Model Toxics Control Act authorize fees in certain limited situations, there is nothing in them to suggest that their (respective) fee provisions can be invoked based upon a violation of an entirely separate statute. *See, e.g.*, RCW 49.70.150 (a civil action may be brought to "compel compliance with the provisions of this chapter or any rule promulgated under this chapter"); RCW 70.105.097 (a "person injured as a result of a violation of this chapter or the rules adopted thereunder may bring an action . . . "); RCW 70.105D.080 ("a person may bring a private right of action . . . for the recovery of remedial action costs"). Finally, neither Ms. Williams nor any of the other plaintiffs included the matter of attorneys' fees in the pretrial order. *See Price Dev. Co. v. Redevelopment Agency*, 852 F.2d 1123, 1128 (9th Cir.1988) (denying request for fees where pretrial order contained no indication that parties would be seeking fees).

(b) Federal law

Ms. Williams also seeks fees under 28 U.S.C. § 1927. That statute provides that an "attorney . . . who so multiplies the proceedings . . . unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

Without question, the attorneys for the defendants mounted a very aggressive defense on behalf of their clients. There is no evidence, however, that they acted in bad faith. For that reason, § 1927 is inapplicable here. *See MGIC Indem. Corp. v. Moore*, 952 F.2d 1120, 1122 (9th Ciri.1991) (§ 1927 requires a finding of bad faith).

B. Costs

In light of the Court's prior rulings, it is clear that Ms. Williams will need to revise her request for costs. She should consider the following in doing so:

Ms. Williams asked for expert witness fees. Since none of her witnesses were court-appointed, she is limited to the sums authorized by 28 U.S.C. § 1821. *See Association of Flight Attendants v. Horizon Air*, 976 F.2d 541, 551-52 (9th Cir.1992).

Ms. Williams seeks reimbursement for obtaining copies of depositions. Although district courts have the authority to tax such costs, *Alflex Corporation v. Underwriters Laboratories*, 914 F.2d 175, 177 (9th Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 61, 116 L.Ed.2d 36 (1991), the exercise of that discretion is often guided by local rule. In this district, "[s]tenographic fees for depositions may be allowed only when the deposition is used at trial or hearing for substantive, as opposed to impeachment purposes. Only the original deposition shall be taxed." Local Rule ("LR") 54(f)(2).

In addition, Ms. Williams may be asking for other costs associated with the taking of depositions. If so, she must demonstrate that the costs were necessarily

incurred. *See Smith v. Hughes Aircraft Co.*, 22 F.3d 1432, 1438-39 (9th Cir.1993).

Finally, Ms. Williams seeks compensation for expenses assumed in obtaining daily transcripts of court proceedings. Because of the length and complexity of the case, Ms. Williams is entitled to an award of costs for those portions of the daily transcript necessary for presentation of her claims. *See Independent Iron Works, Inc. v. United States Steel Corporation*, 322 F.2d 656, 678 (9th Cir.) (trial transcripts were reasonably necessary given the complexity and length of proceedings), *cert. denied*, 375 U.S. 922, 84 S.Ct. 267, 11 L.Ed.2d 165 (1963).

V. MOTION TO AMEND VERDICT

Kaiser Aluminum and Chemical Corporation is one legal entity; Kaiser Aluminum Corporation is another. Since at least October, 1991, it is Kaiser Aluminum and Chemical Corporation which has been one of the two named defendants in this action.

The jury returned its verdict on July 13, 1994. Judgment was entered that same day. The judgment refers to Kaiser Aluminum Corporation, not Kaiser Aluminum and Chemical Corporation.

Defendant Kaiser Aluminum and Chemical Corporation now moves the Court, pursuant to Rule 60, to amend the judgment to reflect its true name. The plaintiffs do not object.

Kaiser aluminum and Chemical Corporation is correct. The wrong corporate entity was listed in the judgment. As a result, its motion will be granted and the judgment modified accordingly.

VI. MOTION TO SET DISCOVERY HEARING

The Plaintiffs move the Court to set a hearing to investigate their allegations that the defendants abused the discovery process. No authorities have been cited in support of this request.

Given the Court's previous rulings, the plaintiffs' motion is (at best) premature. Consequently, their motion will be denied.

VII. MOTION TO STAY EXECUTION OF JUDGMENT

The defendants move the Court to stay any proceedings to enforcement the judgment pending resolution of their post-trial motions. Fed.R.Civ.P. 62(b). With entry of this order, the defendants' request becomes moot. It will therefore be denied.

IT IS HEREBY ORDERED:

1. The plaintiffs' motion to strike defense motions as untimely **(Ct. Rec. 536) is denied.**

2. The defendants'motion to strike plaintiffs' memorandum **(Ct. Rec. 565) is denied.**

3. The plaintiffs' motion to strike reply **(Ct. Rec. 552) is denied.**

4. The defendants' motion for judgement as a matter of law (**Ct. Rec. 488**) is **denied** in part and **granted** in part. The judgments entered herein are re-opened and modified as follows:

(a) The defendants are granted judgment as a matter of law on all claims asserted by Dan Glass, David Schudel, Craig Thompson and Tim Schudel. Those claims are dismissed with prejudice.

(b) The defendants are granted judgment as a matter of law on all non-respiratory claims asserted by Kathrene Froese. Those claims are dismissed with prejudice.

(c) The defendants are granted judgment as a matter of law on all non-neurological claims asserted by Merlin Carlson. Those claims are dismissed with prejudice.

(d) The defendants are granted judgment as a matter of law on all non-respiratory claims asserted by Ruth Hopkins and John Hopkins. Those claims are dismissed with prejudice.

5. The defendants are granted a new trial on all remaining claims.

6. The defendants' motion for new trial or alternative relief (**Ct. Rec. 486**) is **denied**.

7. The plaintiffs' timely request for attorneys' fees and costs shall have the same effect under Fed.R.App.P. 4(a)(4) as a Rule 59 motion, and the period for filing a notice of appeal shall be extended accordingly.

8. The plaintiffs' request for attorneys' fees and costs is **denied** in part and **granted** in part. Ms. Deborah Williams is directed to submit a revised cost bill.

9. Defendant Kaiser Aluminum and Chemical Corporation's motion to amend or correct judgments (**Ct. Rec. 513**) is granted. The judgments entered herein shall refer to "Kaiser Aluminum and Chemical Corporation," not "Kaiser Aluminum Corporation."

10. The plaintiffs' motion for order shortening time (**Ct. Rec. 555**) is **denied**.

11. The plaintiffs' motions for order setting hearing on discovery abuses (**Ct. Recs. 534 and 563**) are **denied**.

12. The defendants' motion for stay of proceedings to enforce judgments (**Ct. Rec. 490**) is **denied.**

IT IS SO ORDERED. The Clerk is hereby directed to file this order, enter judgment accordingly, and furnish copies to counsel.

DATED this 22 day of November 1994.

/s/ Fred Van Sickle
FRED VAN SICKLE
United States District Judge